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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

ALI AKBAR KALBALI,

Plaintiff and Appellant,

v.

ALI ASGHAR KALBALI,

Defendant and Respondent.

H042111

(Santa Clara County

Super. Ct. No. 114CV271602)

I. INTRODUCTION

Plaintiff Ali Akbar Kalbali and his brother defendant Ali Asghar Kalbali, along with other siblings, executed an operating agreement in 2005 for a company that they had formed. Plaintiff failed to make certain capital contributions to the company, and the company notified him that his membership interest in the company was eliminated. On June 24, 2013, a revised operating agreement was executed by only defendant and one sibling, Amir Kalbali, following the forfeiture of memberships by plaintiff and another sibling.

In July 2013 and in 2014, plaintiff requested that defendant arbitrate certain disputes regarding the 2005 operating agreement and defendant's alleged breaches of fiduciary duty. Defendant refused.

Plaintiff filed a petition in the trial court to compel arbitration of certain enumerated claims against defendant, based on an arbitration provision in the 2005 operating agreement. Defendant opposed the petition on three grounds: (1) there was no existing agreement to arbitrate, (2) there was no agreement to arbitrate the claims enumerated in plaintiff's petition, and (3) plaintiff waived the right to arbitrate. The trial court denied the petition, determining that plaintiff failed to meet his burden to show that there was an existing arbitration agreement between the parties that compelled arbitration of the disputes enumerated by plaintiff.

On appeal, plaintiff contends among other arguments that (a) the arbitration provision in the 2005 operating agreement is valid as to claims arising while the agreement was still in effect, that is, prior to June 24, 2013, when the revised operating agreement was signed, and (b) the arbitration provision in the 2005 operating agreement encompasses the disputes he seeks to arbitrate with defendant.

We conclude that that an agreement to arbitrate exists between the parties based on the 2005 operating agreement, and that the arbitration provision in the 2005 operating agreement encompasses the disputes enumerated in plaintiff's petition to compel arbitration. We will therefore reverse the order denying plaintiff's petition to compel arbitration and remand the matter to the trial court to determine whether plaintiff waived his right to arbitrate.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Plaintiff's Petition to Compel Arbitration

On October 7, 2014, plaintiff filed a verified petition to compel arbitration against defendant. In the petition, plaintiff stated that the parties entered into a written operating agreement for RUMI Group, LLC (RUMI) on or about September 21, 2005, and that the agreement was in "full force and effect." According to plaintiff, defendant breached the operating agreement and his fiduciary duty in six respects. Plaintiff further stated that the operating agreement contained a provision requiring the arbitration of the parties'

dispute, that plaintiff had requested RUMI and defendant arbitrate the dispute, and that only RUMI had agreed to arbitration.

Attached to the petition was a document entitled “Operating Agreement for RUMI Group, LLC,” which was purportedly executed on September 21, 2005, by plaintiff, defendant, Mahin Adeeb, and Amir Kalbali. These four individuals were identified in the agreement as members and managers of the company. The purpose of the agreement was “to form and provide for the governance of the Company and the conduct of its business, and to specify their [the four members’] relative rights and obligations.” The “sole purpose” of forming the company was to acquire a particular property in San Jose, develop the property with a commercial building, manage the property, and sell the property for a profit. According to the agreement, the initial members of the company held the following percentage interests in the company: defendant, 60 percent; plaintiff, 15 percent; Mahin Adeeb, 15 percent; and Amir Kalbali, 10 percent.

Paragraph 10.2 of the operating agreement states: “Arbitration. Any action to enforce or interpret this Agreement, or to resolve disputes with respect to this Agreement as between the Company and a Member, or between or among the Members, shall be settled by arbitration in accordance with the rules of the American Arbitration Association. Arbitration shall be the exclusive dispute resolution process in the State of California, but arbitration shall be a nonexclusive process elsewhere. . . . All decisions of the arbitrator shall be final, binding, and conclusive on all parties.”

B. Defendant’s Response, Opposition, and Declaration

Defendant filed an unverified response to plaintiff’s petition to compel arbitration, as well as opposition and a declaration. In his opposition, defendant contended that the petition should be denied for several reasons. First, there was no existing agreement between plaintiff and defendant containing an arbitration provision. According to defendant, the 2005 operating agreement, which plaintiff, defendant, and others signed, was “extinguished, revoked and replaced” by a 2013 revised operating agreement, which

defendant signed but not plaintiff. Second, the claims that plaintiff alleged were subject to arbitration were not claims belonging to plaintiff against defendant, but rather involved RUMI, KAL Design Group, and/or KAL Construction, Inc., the latter two of which were owned by defendant. Third, plaintiff waived the right to arbitrate some of his claims because he unreasonably delayed seven to 10 years before demanding arbitration of those claims.

In a declaration, defendant stated the following. Defendant owned and operated (1) KAL Design Group, (2) KAL Investment LLC, and (3) KAL Construction, Inc. (KAL Construction), which together designed, constructed, and managed commercial and residential properties. In early 2004, defendant decided to purchase and develop a property. Three of defendant's siblings – sister Mahin Adeeb and brothers Amir Kalbali and plaintiff – agreed to join in the investment. They formed RUMI, a limited liability company, with the following interests in the company based on their respective contributions: defendant, 60 percent; plaintiff, 15 percent; Mahin Adeeb, 15 percent; and Amir Kalbali, 10 percent.

In 2004, all four members of RUMI signed a design contract with KAL Design Group. The 2005 operating agreement for RUMI was subsequently executed, and it contained provisions regarding RUMI engaging the services of: (1) KAL Construction to develop and improve the property with a commercial structure, and (2) KAL Design Group to provide design management services, market services, and property manager services regarding the property. Thereafter, between December 2005 and January 2008, RUMI entered into various construction, design, and management contracts with KAL Construction and KAL Design Group for development of the property.

In the meantime, RUMI sought financing for the construction because it could not raise enough money from its members to completely fund the project. A portion of the financing was obtained through a bank, but RUMI still needed more than \$1.6 million for the project.

RUMI ultimately secured a short-term loan from KAL Construction at an interest rate of 12 percent. The purpose of the loan was to provide immediate funds to RUMI to complete development of the property and to provide RUMI with additional time to find another loan. All members of RUMI signed a promissory note in favor of KAL Construction for more than \$1.6 million, which was secured by a deed of trust on the property. Repayment was initially due by July 31, 2008, but the due date was extended multiple times into 2011.

RUMI found a replacement loan from a bank, and the necessary documents were signed by all the members except plaintiff. By August 2011, the KAL Construction loan was again past due. Because plaintiff refused to sign the necessary documents for the bank loan, RUMI had to ask members to make capital contributions to pay down the loan. Plaintiff did not make his required contribution. Additional capital calls were made by RUMI in 2012. Defendant and Amir Kalbali made contributions, but plaintiff and Mahin Adeeb failed to do so.

Defendant offered to purchase the defaulting members' interests in the company pursuant to the terms of the operating agreement. Mahin Adeeb agreed to sell her interest, but plaintiff declined to sell his interest.

In a letter dated June 21, 2013, RUMI notified plaintiff that he failed to make capital contributions as required under the operating agreement, that he was in default, and that the company was exercising its rights under the operating agreement and the law to eliminate his membership interest in the company. Mahin Adeeb's membership interest was also eliminated.

On June 24, 2013, defendant and Amir Kalbali signed a revised operating agreement, which set forth their membership interests in RUMI following the forfeiture of memberships by plaintiff and Mahin Adeeb. Neither plaintiff nor Mahin Adeeb signed the 2013 revised operating agreement. According to the revised agreement, defendant held an 87 percent interest and Amir Kalbali held a 13 percent interest in RUMI. By

November 24, 2014, defendant's interest in RUMI was 88.5 percent and Amir Kalbali's interest was 11.5 percent.

Attached to defendant's declaration were: (1) an operating agreement for RUMI that defendant asserted had been executed on September 21, 2005, and (2) the revised RUMI operating agreement that was signed by defendant and Amir Kalbali on June 24, 2013.

C. Reply in Support of the Petition to Compel Arbitration

In his reply brief, plaintiff contended that the arbitration clause in the 2005 operating agreement was enforceable notwithstanding the subsequent operating agreement "that removed [his] name." Plaintiff also argued that he was not seeking to arbitrate disputes with third parties, such as KAL Design Group or KAL Construction, but rather seeking to arbitrate claims against defendant involving defendant's breach of fiduciary duty. Plaintiff further contended that he had not waived the right to arbitrate because the statute of limitations had not yet run on one of his claims, and he did not learn about some of defendant's other misconduct until 2014. Plaintiff apparently also filed a declaration in the trial court.¹

Defendant filed an objection to plaintiff's reply brief and declaration, contending that it was procedurally improper for plaintiff to file the reply and the declaration was untimely.

D. The Trial Court's Order

Before the scheduled hearing date on plaintiff's petition to compel arbitration, the trial court issued a tentative ruling denying the petition. The court observed that plaintiff's petition was verified and that no declarations were submitted in support of the petition. The court explained that plaintiff had the burden to prove by a preponderance of the evidence that an agreement exists to arbitrate the controversy. The court stated that

¹ Plaintiff's reply declaration is not included in the record on appeal.

defendant had opposed the petition on three grounds: (1) no existing contract between the parties requiring arbitration, (2) no prior or existing agreement to arbitrate the claims enumerated in the petition, and (3) waiver of the right to arbitrate. The court overruled defendant's objection to plaintiff's reply. The court concluded that plaintiff "has not met his burden to show that there is an existing contract between [plaintiff] and [defendant] that compels arbitration of the claims enumerated in the petition."

The tentative ruling became the order of the court after neither party objected to it. (See Cal. Rules of Court, rule 3.1308(a); Super. Ct. Santa Clara County, Local Rules, civil rule 8E.) A written order was filed on February 4, 2015, denying plaintiff's petition to compel arbitration and referring to the tentative ruling.

III. DISCUSSION

Plaintiff contends that the trial court erred in denying his petition to compel arbitration. First, plaintiff argues that the arbitration provision in the 2005 operating agreement is valid as to claims arising while the agreement was still in effect, that is, prior to June 24, 2013, when the revised operating agreement was signed. Plaintiff asserts that all of his claims against defendant arose prior to that date. Second, he characterizes his claims against defendant as breach of contract and breach of fiduciary duty, and he contends that these claims are encompassed within the broadly-written arbitration clause. Lastly, plaintiff contends that if arbitration is not compelled, defendant's conduct "will go unpunished."

Defendant first contends that the arbitration agreement that plaintiff seeks to enforce was "superseded, cannot be enforced due to [plaintiff's] failure to comply with the terms of the agreement, and was invalidated by [plaintiff's] own breaches." Second, defendant argues that the alleged agreement to arbitrate did not cover the claims enumerated in plaintiff's petition to compel arbitration. Third, defendant contends that the trial court impliedly found that plaintiff waived his right to arbitration, substantial evidence supports this finding, and plaintiff has not challenged this finding on appeal.

Lastly, defendant argues that plaintiff has other remedies against defendant outside of arbitration, including a civil lawsuit against defendant and/or an arbitration against RUMI.

Before addressing the substance of the parties' contentions, we will briefly review the statutory scheme that governs private arbitration in California and the standard of review that applies to an order denying a motion to compel arbitration.

A. The Statutory Scheme and the Standard of Review

The California Arbitration Act (Code Civ. Proc., § 1280 et seq.)² “represents a comprehensive statutory scheme regulating private arbitration in this state. [Citation.] Through this detailed statutory scheme, the Legislature has expressed a ‘strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.’ [Citations.] Consequently, courts will ‘indulge every intendment to give effect to such proceedings.’” [Citations.]” (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9.) “The fundamental premise of the scheme is that ‘[a] written agreement to submit [either a present or a future controversy] to arbitration . . . is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.’ (Code Civ. Proc., § 1281.)” (*Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830, fn. omitted.)

Section 1281.2 provides for trial court enforcement of private arbitration agreements: “On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the

² All statutory references hereafter are to the Code of Civil Procedure unless otherwise indicated.

petitioner; or [¶] (b) Grounds exist for the revocation of the agreement.” (§ 1281.2.) “Accordingly, in ruling on a petition to compel, the court must determine whether the parties entered into an enforceable agreement to arbitrate that reaches the dispute in question, construing the agreement to the limited extent necessary to make this determination. [Citation.] If such an agreement exists, the court must order the parties to arbitration unless arbitration has been waived or grounds exist to revoke the agreement. [Citation.]” (*California Correctional Peace Officers Assn. v. State of California* (2006) 142 Cal.App.4th 198, 204-205 (*California Correctional Peace Officers Assn.*).)

In the trial court, the party seeking arbitration bears the burden of proving the existence of an arbitration agreement by the preponderance of the evidence, and the party opposing arbitration bears the burden of proving by a preponderance of the evidence any defense. (*Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*); *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 972 (*Engalla*).) In the summary proceedings under section 1281.2, “the trial court sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court’s discretion, to reach a final determination.” (*Engalla, supra*, at p. 972.)

An order denying a petition to compel arbitration is an appealable order. (§ 1294, subd. (a).) On appeal, the standard of review is substantial evidence if the trial court resolved disputed facts in ruling on the petition. (*Brown v. Wells Fargo Bank, N.A.* (2008) 168 Cal.App.4th 938, 953 (*Brown*).) “In such a case we must ‘accept the trial court’s resolution of disputed facts when supported by substantial evidence; we must presume the court found every fact and drew every permissible inference necessary to support its judgment, and defer to its determination of the credibility of witnesses and the weight of the evidence.’ ” [Citation.]” (*NORCAL Mutual Ins. Co. v. Newton* (2000) 84 Cal.App.4th 64, 71.)

Where the facts regarding the petition to compel arbitration were undisputed, the standard of review is de novo. (*Brown, supra*, 168 Cal.App.4th at p. 953; *Pinnacle, supra*, 55 Cal.4th at p. 236.) If only a question of law is involved, the standard of review is also de novo. (*Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1425.)

B. Plaintiff and Defendant Entered into an Agreement to Arbitrate in the 2005 Operating Agreement

Plaintiff alleged in his verified petition to compel arbitration that the parties entered into an operating agreement for RUMI on or about September 21, 2005, and that the agreement contained an arbitration provision. Plaintiff stated that a copy of the operating agreement was attached to the petition.³

In a declaration in opposition to plaintiff's petition, defendant conceded that the parties had entered into a written operating agreement for RUMI in 2005. Defendant

³ Defendant refers to the copy of the 2005 operating agreement that is attached to plaintiff's verified petition as an "unauthenticated copy." We disagree with defendant's characterization of the document.

"A petition to compel arbitration is to be heard in the manner of a motion. [Citation.] Factual issues on motions are submitted on affidavits or declarations (or oral testimony in the court's discretion). [Citations.]" (*Strauch v. Eyring* (1994) 30 Cal.App.4th 181, 184.) In general, "a verified pleading may not be used in motion proceedings in lieu of affidavits or declarations, 'because pleadings usually contain allegations of "ultimate facts" rather than "evidentiary facts."' [Citation.]" (*Id.* at p. 186.)

In this case, however, plaintiff stated in his verified petition that the document attached to the petition was a copy of the parties' 2005 operating agreement. This statement of evidentiary fact, in a petition verified under penalty of perjury, was the equivalent of making the same factual statement in a declaration or affidavit. (See *Atkins, Kroll & Co. v. Broadway Lumber Co.* (1963) 222 Cal.App.2d 646, 654 ["A verified pleading is itself an affidavit and may be considered as such"].)

attached to his declaration a RUMI operating agreement, which he asserted had been executed by plaintiff on or about September 21, 2005.⁴

The 2005 operating agreement provides that “[a]ny action to enforce or interpret this Agreement, or to resolve disputes with respect to this Agreement as between the Company and a Member, *or between or among the Members, shall be settled by arbitration* in accordance with the rules of the American Arbitration Association. Arbitration shall be the exclusive dispute resolution process in the State of California All decisions of the arbitrator shall be final, binding, and conclusive on all parties.” (Italics added.) The 2005 operating agreement identifies plaintiff and defendant individually as a “Member” and refers to them collectively, along with others, as “Members.” Thus, plaintiff and defendant agreed to arbitration as specified in the 2005 operating agreement.

⁴ The 2005 operating agreement attached to defendant’s declaration is not identical to the 2005 operating agreement attached to plaintiff’s verified petition. The two versions differ in the number of members of RUMI and the percentage interests in the company. Defendant’s copy of the 2005 operating agreement identifies the company’s members as (1) plaintiff, (2) defendant, and (3) Mahin Adeeb, with interests in the company of 60 percent, 27 percent, and 13 percent. In contrast, plaintiff’s copy of the 2005 operating agreement includes a fourth member of the company, Amir Kalbali, with the four members’ interests in the company as follows: defendant, 60 percent; plaintiff, 15 percent; Mahin Adeeb, 15 percent; and Amir Kalbali, 10 percent. Based on the record, it appears that defendant’s copy is the parties’ initial agreement and plaintiff’s copy is a revision that included Amir Kalbali as a member and corrected the “inaccurately listed” ownership percentage.

Neither plaintiff nor defendant contended below or on appeal that there is a difference between the two versions of the 2005 operating agreement that is relevant to this appeal. Further, defendant acknowledged in his declaration filed in the trial court that the fourth member, Amir Kalbali, was one of the original members of the company when it initially formed, and that the interests originally held by the members were as follows: defendant, 60 percent; plaintiff, 15 percent; Mahin Adeeb, 15 percent; and Amir Kalbali, 10 percent. These facts are consistent with the operating agreement attached to plaintiff’s verified petition. Consequently, we will refer and cite to the agreement attached to plaintiff’s verified petition as the “2005 operating agreement.”

Defendant contends that the 2005 operating agreement, including its arbitration provision, (1) was “superseded” by the 2013 revised operating agreement, and (2) “cannot be enforced due to [plaintiff’s] failure to comply with the terms of the agreement” and “was invalidated by [plaintiff’s] own breaches.”

We are not persuaded by defendant’s contentions.

First, regarding defendant’s argument that the 2005 operating agreement was superseded, defendant relies on the following language in the 2013 revised operating agreement: “This Agreement replaces and supersedes all prior written and oral agreements by and among the Members and Managers or any of them with respect to the subject matter contained in this Agreement that are inconsistent with the terms of this Agreement.”

Defendant fails, however, to provide legal authority to support his contention that the existence of this language in the 2013 revised operating agreement precluded plaintiff from seeking enforcement of the arbitration provision in the 2005 operating agreement. “[A] party’s contractual duty to arbitrate disputes *may* survive termination of the agreement giving rise to that duty.” (*Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 545, italics added.) In this case, plaintiff was a signatory to the 2005 operating agreement but not to the 2013 revised operating agreement. Only defendant and Amir Kalbali signed the latter agreement. Defendant fails to provide legal authority to support the proposition that an arbitration provision is unenforceable if it is contained in an agreement that has since been “superseded” by a subsequent agreement between a *different* set of parties. For example, “[a] contract may be rescinded . . . ‘if *all the parties* thereto consent.’ [Citation.]” (*Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 640, fn. 14, italics added.) Alternatively, “[u]nder principles of novation, a new contract may be substituted for an old contract by ‘the substitution of a new obligation between *the same parties*, with intent to extinguish the old obligation.’ [Citation.]” (*Ibid.*, italics added.) In this case, plaintiff was *not* a party to the 2013

revised operating agreement and nothing in the record suggests that he agreed to the 2005 operating agreement being superseded. Further, defendant fails to provide legal authority to support the proposition that the arbitration provision in the 2005 operating agreement is unenforceable with respect to claims that arose *while* the 2005 operating agreement was undisputedly in effect – that is, prior to the June 24, 2013 signing of the 2013 revised operating agreement. (See *Bos Material Handling, Inc. v. Crown Controls Corp.* (1982) 137 Cal.App.3d 99, 106 [arbitration provision applied to wrongdoing that allegedly occurred while the agreement was in effect].)

Second, regarding defendant’s contention that plaintiff failed to comply with the terms of the 2005 operating agreement and otherwise breached the agreement, defendant points to evidence that plaintiff “failed to make required Capital Calls issued by RUMI.”

Defendant fails, however, to provide persuasive legal authority to support the proposition that plaintiff’s failure to comply with, and breach of, the terms of the 2005 operating agreement consequently rendered the arbitration provision contained within that agreement unenforceable. As we set forth above, section 1281.2 requires a court to order arbitration if “an agreement to arbitrate the controversy exists,” *unless* the court determines: “(a) The right to compel arbitration has been *waived* by the petitioner; or [¶] (b) Grounds exist for the *revocation* of the agreement.” (§ 1281.2, italics added; see *California Correctional Peace Officers Assn., supra*, 142 Cal.App.4th at p. 205.) The reference to “revocation of the agreement” in section 1281.2 has been construed “to mean that the petition to compel arbitration is not to be granted when there are grounds for rescinding the agreement.” (*Engalla, supra*, 15 Cal.4th at p. 973.) In this case, defendant does not articulate how or provide persuasive legal authority establishing that plaintiff’s alleged breach amounts to a waiver of the right to compel arbitration or constitutes a ground for rescinding the agreement. Significantly, “[t]he mere fact of a contractual breach in no way impairs the continuing efficacy of the arbitration provision: the very

purpose of arbitration is to resolve the controversy created by [an] alleged breach.”
(*Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 237.)

In sum, the parties undisputedly agreed to arbitration in the 2005 operating agreement. Defendant fails to provide persuasive legal authority establishing that the arbitration provision is unenforceable because it is contained in the 2005 operating agreement that was (a) breached by plaintiff or (b) superseded by the 2013 revised operating agreement that was not signed by plaintiff.

C. Scope of the Arbitration Agreement

The parties next dispute whether the claims enumerated in plaintiff’s petition to compel arbitration fall within the scope of the arbitration provision.

“ ‘The scope of arbitration is a matter of agreement between the parties.’
[Citation.] ‘A party can be compelled to arbitrate only those issues it has agreed to arbitrate.’ [Citation.] Thus, ‘the terms of the specific arbitration clause under consideration must reasonably cover the dispute as to which arbitration is requested.’ [Citation.] For that reason, ‘the contractual terms themselves must be carefully examined before the parties to the contract can be ordered to arbitration’ by the court. [Citation.]”
(*Molecular Analytical Systems v. CIPHERGEN Biosystems, Inc.* (2010) 186 Cal.App.4th 696, 705.) “ ‘However, doubts as to the scope of an agreement to arbitrate are to be resolved in favor of arbitration.’ [Citations.]” (*Ibid.*) “The party opposing arbitration has the burden of showing that the agreement, as properly interpreted, does not apply to the dispute. [Citations.]” (*Ibid.*)

An arbitration clause “is generally considered to be more limited in scope” when it applies to a dispute “ ‘arising from’ ” the agreement. (*Cobler v. Stanley, Barber, Southard, Brown & Associates* (1990) 217 Cal.App.3d 518, 530 (*Cobler*).) In contrast, “[a] ‘broad’ clause includes those using language such as ‘any claim arising from or related to this agreement’ [citation].” (*Bono v. David* (2007) 147 Cal.App.4th 1055, 1067, some italics omitted.) “[A] clause agreeing to arbitrate ‘ “any controversy . . .

arising out of *or relating to* this agreement,” ’ . . . might thus cover misconduct arising out of the agreement as well as contractual issues. [Citation.]” (*Cobler, supra*, at p. 530.) In particular, “ ‘where contracts provide arbitration for “ ‘any controversy . . . arising out of *or relating to* the contract . . . ’ ” the courts have held such arbitration agreements sufficiently broad to include tort, as well as contractual, liabilities so long as the tort claims “have their roots in the relationship between the parties which was created by the contract.” [Citations.]’ [Citation.]” (*Izzi v. Mesquite Country Club* (1986) 186 Cal.App.3d 1309, 1315-1316 (*Izzi*), italics added.)

In this case, the parties’ arbitration provision in the 2005 operating agreement states: “Any action *to enforce or interpret* this Agreement, or to resolve disputes *with respect to* this Agreement as between the Company and a Member, or between or among the Members, shall be settled by arbitration in accordance with the rules of the American Arbitration Association.” (Italics added.) The first part of the arbitration provision – regarding any action “to enforce or interpret” the 2005 operating agreement – encompasses contract actions involving the enforcement or interpretation of the 2005 operating agreement. The second part of the arbitration provision applies to disputes “with respect to” the 2005 operating agreement. The phrase “with respect to” means “concerning” and “*in relation to*.” (Merriam-Webster’s Online Dict. <<http://www.merriam-webster.com/dictionary/with%20respect%20to>> [as of Oct. 19, 2016], italics added.) This language in the second part of the arbitration provision – disputes “with respect to” the 2005 operating agreement – is thus similar to language that has been deemed broad in scope, such as “related to” or “relating to.” The parties’ arbitration provision is thus “ ‘sufficiently broad to include tort, as well as contractual, liabilities so long as the tort claims “have their roots in the relationship between the parties which was created by the contract.” ’ ” (*Izzi, supra*, 186 Cal.App.3d at pp. 1315-1316.)

In plaintiff's petition to compel arbitration (paragraph 3), plaintiff set forth the following six claims or disputes, which he characterized as breaches of the operating agreement and which he sought to arbitrate with defendant:

"a) Pursuant to Paragraph 5.5 of the Operating Agreement all management decisions are to be determined by a majority vote of managers. Each manager has 1 vote. This interpretation was confirmed by RUMI LLC's prior attorney. Said attorney was retained by [defendant]. [Defendant] subsequently fired said attorney and has claimed that he has sole authority to determine manager's decision based on his 60% ownership interest in violation of said agreement. Therefore, any actions such as the most recent capital call were not approved by a majority of managers and are therefore ineffective.

"b) KAL Design Group's contract with RUMI is void. KAL Design Group is an unlicensed property manager. The contract provides compensation to [defendant's] company that is greater than would be charged by a reputable company. [Defendant] breached his fiduciary duty to his fellow members. In addition, earlier KAL Design Group contracts were duplication of work KAL Construction agreed to perform.

"c) KAL Construction Inc. agreed to perform construction services for no more than a reputable construction company bid on the project. KAL Construction charged over \$1,000,000 more than the bid it matched.

"d) [Defendant] and KAL Construction charged 12% for a loan plus 3 points to RUMI in violation of [defendant's] fiduciary duty. This is a usurious interest rate. Based on information and belief, the 3 points went to an unlicensed individual

"e) RUMI and [defendant] treated members of the LLC in a discriminatory and selective manner in violation of their fiduciary duty by allowing 1 member who could not pay her capital call to be bought out while refusing to provide the same buy out to [plaintiff] in violation of Paragraph 3.8 of the Operating Agreement.

"f) KAL Construction overcharged for overhead/profit approximately \$270,0000.00 [sic]. In addition, KAL Construction charged an additional 15% charge for

late payments. [Defendant] paid every KAL Construction bill late, despite having available funding. Therefore, KAL Construction overcharged by \$808,110.00 for late charges.”

The claims or disputes described in subparagraphs a) and e) of plaintiff’s petition fall within the arbitration provision, as they involve an “action to enforce or interpret” specified paragraphs of the 2005 operating agreement.

The remaining subparagraphs – b), c), d), and f) – of plaintiff’s petition pertain to alleged wrongdoing by KAL Design Group and KAL Construction, which were two entities that defendant owned and operated according to defendant’s own declaration. These entities allegedly overcharged RUMI in various transactions, and defendant, as a member of RUMI, allegedly breached his fiduciary duty to plaintiff and other RUMI members with respect to the transactions. Although plaintiff did not specifically allege in subparagraphs c) and f) that defendant violated his fiduciary duty, the claims in those subparagraphs pertain to a defendant-operated company overcharging RUMI, similar to subparagraphs b) and d), which do specifically allege that defendant violated or breached his fiduciary duty.

In view of the broad language of the arbitration provision covering “[a]ny action . . . to resolve disputes *with respect to* this Agreement,” we determine that the arbitration provision is sufficiently broad to include plaintiff’s breach of fiduciary duty claims against defendant in subparagraphs b), c), d), and f) of the petition. (Italics added.) The 2005 operating agreement formed RUMI, with plaintiff and defendant among its members. The 2005 operating agreement also provided “for the governance of the Company and the conduct of its business, and . . . specif[ied] [the members’] relative rights and obligations.” Defendant’s alleged breaches of his fiduciary duty to plaintiff and other members of RUMI are therefore claims that “ ‘ “have their roots in the relationship between the parties which was created by the [2005 operating agreement]” ’ ” and, accordingly, the claims are encompassed by the broad arbitration

provision in the 2005 operating agreement. (*Izzi, supra*, 186 Cal.App.3d at pp. 1315-1316.)

Defendant contends that the arbitration provision does not cover any of plaintiff's claims. We are not persuaded by defendant's contentions.

In particular, defendant makes the following arguments regarding the contract claims alleged in subparagraphs a) and e) of plaintiff's petition: (1) the claims are more properly alleged against RUMI and defendant may not be held individually liable, (2) plaintiff failed to establish that he complied with the terms of the 2005 operating agreement and therefore he is not entitled to seek enforcement of that agreement, and (3) certain provisions of the 2005 operating agreement undermine plaintiff's claims. These arguments by defendant pertain to the *merits* of plaintiff's claims, including whether plaintiff has a viable claim against defendant individually. However, "[s]ection 1281.2 expressly forbids the court from reaching the merits of the parties' dispute, instructing that '[i]f the court determines that a written agreement to arbitrate a controversy exists, an order to arbitrate such controversy may not be refused on the ground that the petitioner's contentions lack substantive merit.' " (*California Correctional Peace Officers Assn., supra*, 142 Cal.App.4th at p. 205.) In other words, "section 1281.2 expressly *forbids* courts from denying arbitration on the ground that the petitioner's claim is meritless." (*Id.* at p. 211.)

Defendant makes the following arguments regarding the claims alleged in subparagraphs b), c), d), and f) of plaintiff's petition, concerning wrongdoing by KAL Design Group and KAL Construction in transactions with RUMI: (1) the claims belong to RUMI and not to plaintiff, and (2) the claims are more properly alleged against KAL Design Group or KAL Construction, rather than against defendant.

We disagree with defendant's characterization of plaintiff's claims in subparagraphs b), c), d), and f) of plaintiff's petition. Although the transactions described in those subparagraphs refer to transactions between RUMI and KAL Design

Group or KAL Construction, it appears that plaintiff seeks to hold defendant liable for those transactions based on the theory that he breached his fiduciary duty as a member of RUMI. Whether plaintiff's claims actually have merit is not relevant in determining whether to grant or deny the petition to compel arbitration. (See *California Correctional Peace Officers Assn.*, *supra*, 142 Cal.App.4th at pp. 205, 211.) We determine only that plaintiff's claims, which seek to hold defendant, as a member of RUMI, liable for breaches of fiduciary duty to another RUMI member, are within the scope of the parties' arbitration provision.

D. Waiver

In the trial court's order regarding plaintiff's petition to compel arbitration, the court observed that defendant had "oppose[d] the petition, on three grounds: 1) there is no existing contract between [plaintiff] and [defendant] to compel [defendant] to arbitrate; 2) there is no agreement existing now or in the past to arbitrate the claims enumerated in the petition; and 3) if there were a right to arbitrate, [plaintiff] has waived it." In denying the petition, the court stated: "[Plaintiff] has not met his burden to show that there is an existing contract between [plaintiff] and [defendant] that compels arbitration of the claims enumerated in the petition."

Defendant contends that, although the trial court did not expressly state in its order that plaintiff had waived his right to arbitrate, it must be implied that the court made such a finding. Defendant further contends that substantial evidence supports such a finding.

Plaintiff contends that the trial court's order does not mention the issue of waiver, and that a finding of waiver cannot be implied because such a finding is not necessary to support the court's order.

A party may request from the trial court a statement of decision explaining the factual and legal basis for a ruling denying a petition to compel arbitration. (*Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 970.) "A party's failure to request a statement of decision when one is available has two consequences. First, the

party waives any objection to the trial court's failure to make all findings necessary to support its decision. Second, the appellate court applies the doctrine of implied findings and presumes the trial court made all necessary findings supported by substantial evidence. [Citations.]" (*Ibid.*) "Generally, the determination of waiver is a question of fact." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1196.)

In this case, the trial court in its order set forth the three bases for defendant's opposition to plaintiff's petition. The court then denied the petition using language nearly identical to two of the bases that the court had just set forth in the order: (1) no "existing contract between" the parties that "compels arbitration" of (2) "the claims enumerated in the petition." The court did not make any reference to waiver as a basis for its denial of plaintiff's petition. Further, a finding of waiver is not necessary to support the court's order. Indeed, implying a finding that plaintiff *had* a right to arbitrate that was waived would be inconsistent with the court's express finding that plaintiff did *not* have the right to arbitrate in the first place.

Therefore, because the trial court ruled on only two of the three bases defendant raised in his opposition to the petition to compel arbitration, and because we determine that those two bases were not sufficient grounds to deny plaintiff's petition to compel arbitration, we will remand the matter for the trial court to consider the issue of waiver. (See *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1330-1331.)

IV. DISPOSITION

The February 4, 2015 order denying plaintiff Ali Akbar Kalbali's petition to compel arbitration is reversed. The matter is remanded for the trial court to determine whether plaintiff waived his right to invoke the arbitration provision in the 2005 operating agreement.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MIHARA, J.